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In The

Supreme Court of the United States

October Term, 1971

No. 71-3921

HAROLD S. KAHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

HAROLD S. KAHN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, HAROLD S. KAHN, respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit which dismissed the appeal pending before that Court without an opportunity for oral argument and without an been taken from a judgment of the United States District Court for the Southern District of New York convicting Petitioner of the crimes of conspiracy to defraud an agency of the United States, namely the Internal Revenue Service (Count 1 of the indictment); and a violation of 18 U.S.C. 201 (b) (Count 7 of the indictment) upon his plea of

guilty following the denial of certain motions which sought a dismissal of the charges upon questions of law.

Opinion Below

The United States Court of Appeals rendered no opinion. Its short decision and order is reproduced in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1). The Court of Appeals Second Circuit granted the Government's motion to dismiss the appeal without affording petitioner an opportunity to submit briefs or to argue the appeal on the merits, apparently on the grounds that no appeal lies from a judgment of conviction predicated upon a plea of guilty since such an appeal, according to the Government, would have been frivolous. The order dismissing the appeal is dated August 18, 1971. (See Appendix.)

Questions Presented

1. Whether every defendant convicted of a crime in a federal court is entitled as a matter of right to appeal his judgment of conviction to the appropriate United States Court of Appeals and to be heard thereon?

2. Was petitioner denied due process of law and the equal protection of the law when the United States Court of Appeals for the Second Circuit, upon application of the Government, granted a

motion dismissing the appeal because the petitioner had interposed a plea of guilty in the District Court?

3. Does the interposition of a plea of guilty following the denial of legal motions seeking to dismiss an indictment render appellate review unavailable to a defendant in a federal criminal case?

4. May the United States Court of Appeals preclude appellate review without reviewing the record of the District Court merely because the Government has taken the position that the appeal would be frivolous since a plea of guilty was entered following a series of unsuccessful legal motions seeking to dismiss the indictment?

Constitutional and Statutory Provisions Involved

The First, Fifth and Sixth Amendments of the United States Constitution are involved herein. Section 9 of Article I of the United States Constitution is also involved.

Statement of the Case

The petitioner herein was a career employee of the Internal Revenue Service, having served with distinction for close to twenty years, and held the title of Appellate Conferee. Petitioner is also an attorney at law as well as the father of a family and has never previously been in conflict with the law.

The indictment herein was one of a series obtained in large measure through the efforts of an

"agent provocateur" and there was a serious issue of entrapment. In addition, there had been a substantial issue as to denial of a speedy trial and also questions involving electronic surveillance and unlawful search and seizure which were raised in pretrial motions by the petitioner in the District Court.

The trial judge denied these motions, all of which were addressed to legal and constitutional questions. There were virtually no fact questions presented which would have to be decided by a jury.

Once these motions were denied a trial on questions of fact would have been an exercise in futility.

Therefore, immediately following the denial of these motions, the defendant (petitioner herein) interposed a plea of guilty through his attorney to certain counts of the indictment.

A timely notice of appeal was filed. The District Court and the Circuit Court denied bail pending appeal because the petitioner had pleaded guilty and, consequently, the Government argued that any appeal would be frivolous. The position taken by the petitioner however was that the motions were reviewable on an appeal despite the plea of guilty since the plea of guilty was designed primarily to avoid expense and time which would be involved in going through a trial of fact questions when actually the issues which are involved herein are questions of constitutional and statutory law only.

The decision of the United States Court of

Appeals dismissing the appeal is as follows:

> "Upon the motion made hereby by counsel for the appellee by notice of motion dated July 26, 1971 to dismiss the appeal and upon the answering statements in opposition to dismissal of the appeal, dated July 28, 1971, it hereby is ordered that the appeal is dismissed. See, e.g., Richardson v. McMann, 397 U.S. 759 (1969); Bergin v. MacDougall, 432 F.2d 935 (2d Cir. 1970); United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965)."

It is the position of the petitioner herein that he has a right to perfect an appeal irrespective of whether or not such an appeal would be frivolous. (We contend the appeal is not frivolous). The equal protection of the laws and due process guarantee each defendant in a federal criminal case an absolute right to appeal to the United States Court of Appeals in the appropriate circuit. If the Court of Appeals may dismiss such appeals without argument on the merits and without reviewing the record of the case, then there is a clear denial of equal protection of the laws.

Argument

I.

THE PETITIONER HAVING BEEN CONVICTED IN THE UNITED STATES DISTRICT COURT HAD AN UNQUALIFIED RIGHT TO APPEAL TO THE UNITED STATES COURT OF APPEALS. THE COURT OF APPEALS, UPON APPLICATION OF THE GOVERNMENT, PRECLUDED AN APPEAL BECAUSE PETITIONER HAD PLEADED GUILTY AFTER HAVING MADE CERTAIN LEGAL MOTIONS OF CONSTITUTIONAL DIMENSION. PETITIONER NEVER EXPRESSLY WAIVED HIS RIGHT TO APPEAL.

The defendant-petitioner herein, HAROLD S. KAHN, a career employee with the Internal Revenue Service who held the title of Appellate Conferee at the time of his indictment, was convicted upon his plea of guilty, of conspiracy, with one Robert Wiene and others, to defraud the United States by failing to report income of a substantial amount; and of giving a sum of money to an official of the Internal Revenue Service.

An appeal as of right pursuant to Rules 3 and 4 of the Rules of Appellate Procedure was timely filed.

There is no doubt but that motions were made on behalf of the petitioner pursuant to Rules 41(e) and 48(b) of the Federal Rules of Criminal Procedure. Pursuant to these motions the petitioner sought to dismiss the indictment because it had been inordinately delayed without just cause for a substantial period of time. In addition, suppres-

sion of evidence, including electronic surveillance, was sought because certain material had been obtained in apparent violation of the Fourth, Fifth and Sixth Amendments. The District Court denied the motions. Since there were virtually no issues of fact that were involved, the defendant-petitioner pled guilty to Counts 1, 4 and 7 of the indictment and was sentenced to a fine plus 15 months imprisonment.

There was no express or implied waiver of rights articulated by the petitioner or his trial counsel. This Court has stated that there is a presumption against waiver of constitutional rights (JOHNSON v. ZERBST, 304 U.S. 458, 464; TAYLOR v. UNITED STATES, [D.C. Cir.] 238 F.2d 259).

The United States Attorney for the Southern District however, took the position that a plea of guilty in essence precluded appellate review since there was a presumption of waiver of any motions which were made prior to the plea of guilty. In the case of UNITED STATES v. DOYLE, 348 F.2d 715 (2 Cir.), cert. denied 382 U.S. 843 (1965), the United States Court of Appeals for the Second Circuit indicated that motions made prior to a plea of guilty could be raised on appeal if the defendant pleading guilty specifically reserved his rights to do so. It is ironic however, that in the DOYLE case, the Court of Appeals apparently permitted counsel for the defendant to submit briefs and to argue the appeal. The judgment of conviction in the DOYLE case was affirmed so it would appear that the appeal was heard on the merits, otherwise the decision would have to have been that the appeal was "dismissed."

In its brief decision dismissing the appeal herein the Court of Appeals also cites RICHARDSON v. McMANN, 397 U.S. 759 (1969) and BERGIN v. MacDOUGALL, 432 F.2d 935 (2 Cir. 1970), which are both habeas corpus cases where the appellants there sought to have federal courts review by collateral attack matters which could have been raised directly in the state courts. Nothing in either the RICHARDSON or BERGIN cases indicates that an appeal "as of right" may be dismissed because a plea of guilty has been interposed.

As a matter of fact, it is respectfully submitted that the presumption should be that a defendant in a criminal case has not waived any rights rather than that he has. This is particularly so in a case such as the one at bar where the plea of guilty was interposed almost immediately following the denial of the motions to dismiss the indictment and to suppress evidence. In the case of both motions incidentally, the District Court refused to hold any hearings.

The further fact that the defendant-petitioner filed a timely notice of appeal would indicate that he was attempting to review the motions since there would be no other reason to file a notice of appeal. This procedure strongly would indicate that no waiver of any rights was intended.

If the petitioner herein were an indigent, it would appear that the Circuit Court would not have considered dismissing the appeal (see DOUGLAS v. CALIFORNIA, 372 U.S. 353; and ANDERS v. CALIFORNIA, 386 U.S. 738 [1967]). The right

to appeal however is given to all people who are convicted in a District Court and not just to indigents or to wealthy persons. (Petitioner herein, incidentally, has advised his counsel that he is in a precarious financial position.)

The courts have held that where the right to appeal is given at all, it must be allowed to everyone and may not be arbitrarily denied. (See COCHRAN v. KANSAS, 316 U.S. 255; DOWD v. UNITED STATES, 340 U.S. 206; GRIFFIN v. ILLINOIS, 351 U.S. 12; BURNS v. OHIO, 360 U.S. 252; GARDNER v. CALIFORNIA, 393 U.S. 367; and WILLIAMS v. OKLAHOMA CITY, 395 U.S. 458.)

In DOUGLAS v. CALIFORNIA, supra, this Court held that where persons appeal as of right, they must be accorded substantially equal treatment. As a matter of fact, in DOUGLAS, this Court indicated that the requirement of a preliminary determination of merit of an appeal is improper as a prerequisite for having an appeal.

The petitioner takes the position that since an appeal as of right lies from a judgment of conviction in a District Court, a Circuit Court may affirm the judgment with little or no delay but it cannot preclude appellant from presenting a brief and permitting his counsel to be heard on the merits in oral argument, especially where such rights are uniformly granted to all appellants. (DOUGLAS v. CALIFORNIA, supra, 372 U.S. at 357, 358.)

In COPPEDGE v. UNITED STATES, 369 U.S. 438, this Court declared that where it is a practice

to defer rulings on motions to dismiss until the court has had the benefit of hearing argument and considering briefs and an adequate record, it would be improper to accord an appellant different treatment for no apparent reason. In COPPEDGE, this Court aptly stated (id. at 449):

> "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."

In NOWAKOWSKI v. MARONEY, 386 U.S. 542, this Court also declared its general determination that the right to appeal may not be selectively rescinded.

A. The ruling of the Circuit Court in essence means that a defendant convicted in the District Court upon a plea of guilty automatically forfeits his right to appeal.

The ruling of the Circuit Court necessarily means that the merits of an appeal will not be heard where it appears that the defendant in the District Court pleaded guilty. It is obvious however that this Court has entertained cases involving pleas of guilty, so the ruling of the court below is clearly contrary to established procedure (see McCARTHY v. UNITED STATES, 394 U.S. 459

[1969] and RICHARDSON v. McMANN, 397 U.S. 759).

The petitioner herein went through the trouble of making motions in the District Court which involved constitutional issues under the Fourth, Fifth and Sixth Amendments as well as Rules 41(e) and 48(b) of the Federal Rules of Criminal Procedure. The Court below, however, precluded appellate review on the grounds that a plea of guilty was entered following the denial of those motions. It is thus apparent that the merits of petitioner's contentions were not reviewed in the Court of Appeals. He in essence was denied appellate review because when he opposed the dismissal of the appeal, he frankly admitted that the appeal itself would necessarily have to consider the timely motions which were made and denied by the District Court. Those motions however, involved matters of great substance and a dismissal of an appeal deprived KAHN of the equal protections of the law.

This Court denied certiorari in UNITED STATES v. DOYLE, supra (382 U.S. 843). It is elementary however that the denial of a writ of certiorari "imports no expression of opinion upon the merits of the case as the bar has been told many times" (UNITED STATES v. CARVER, 260 U.S. 482, 490; BROWN v. ALLEN, 344 U.S. 443, 451-2, 491-2; SUNAL v. LARGE, 332 U.S. 174, 181. See also MARYLAND v. BALTIMORE RADIO SHOW, 338 U.S. 912, 917-20).

It is thus apparent that this Court has never declared that a defendant who pleads guilty in a District Court is precluded from appealing.

This Court should grant certiorari in this case and, incidentally, should also admit the petitioner to bail at once since the issue herein transcends this particular case. The vice noted in DOUGLAS v. CALIFORNIA, supra, that an appellant must show the merits of his case before he can appeal, is apt to become the uniform procedure unless this Court straightens the question out, once and and for all.

The issue is not whether the District Court was wrong or right in denying the motions without a hearing. The issue is whether or not petitioner had a right to have the determination of the District Court reviewed. The procedure of going through a trial would have enabled KAHN to enjoy full review of the motions as well as the trial. Since however, it would have been an exercise in futility to go through the expense and time of a trial when virtually no factual issues were involved, it is submitted that the Court of Appeals should at least have reviewed the legal questions which were timely raised.

There should be no automatic waiver presumed as the Court of Appeals has assumed, since such a presumption contravenes this Court's pronouncements in such cases as JOHNSON v. ZERBST, supra. In addition, the requirements in UNITED STATES v. DOYLE, supra, expressed by the Circuit Court, that a defendant must expressly reserve his right to appeal where he pleads guilty is contrary to due process and contrary to law.

If an appeal may be heard from a plea of guilty by "reserving one's rights" (DOYLE v. UNITED STATES, supra), then it is totally unfair

and illogical to deny this right to review merely because counsel did not articulate the reservation of rights.

The petitioner herein, a lawyer as well as a career employee of the Internal Revenue Service for almost a generation, has been denied due process of law and the equal protection of the laws. His fundamental right to appeal was in effect denied despite the fact that he complied with all the procedural prerequisites.

In the landmark case of GRIFFIN v. ILLINOIS, 351 U.S. 12, the opinion of Justice Black speaking for four of the Justices, aptly explained:

> "* * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. * * * It is true that a State is not required by the federal constitution to provide appellate courts or a right to appellate review at all. * * * But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. * * *
>
> "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilty or innocence. Statistics show that a substantial

> proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."

In view of the foregoing, we respectfully submit that the petition for certiorari should be granted, the petitioner should be admitted to bail, and the order of the United States Court of Appeals dismissing the appeal should be reversed with instructions to permit an appeal on the merits, including the motions which were made and denied by the District Court just prior to the plea of guilt.

Conclusion

The petition for certiorari should be granted and the matter remanded to the Circuit Court with instructions to hear the appeal on the merits, including any motions which were made prior to the plea of guilty. The petitioner should also be admitted to bail pending the determination of this case.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

Order Dismissing Appeal

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of August, one thousand nine hundred seventy-one.

- - - - - - - - - - - - - - - - - - - -x

United States of America,

Plaintiff-Appellee,

v.

Harold Kahn,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - - -x

Upon the motion made herein by counsel for the appellee by notice of motion dated July 26, 1971 to dismiss the appeal and upon the answering statements in opposition to dismissal of the appeal, dated July 28, 1971, it hereby is ordered that the appeal is dismissed. See, e.g., Richardson v. McMann, 397 U.S. 759 (1969); Bergin v. MacDougall, 432 F.2d 935 (2d Cir. 1970); United States v.

Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

s/ Wilfred Feinberg
Wilfred Feinberg

s/ William H. Mulligan
William H. Mulligan

s/ William H. Timbers
William H. Timbers
Circuit Judges